

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

EDGARDO MILLET-SANCHEZ

Plaintiff

v.

CIVIL NO. 96-2052 (JAG)

ACAA, et. al.

Defendants

REPORT AND RECOMMENDATION

On February 12, 1999, the Court adopted Magistrate-Judge Aida M. Delgado's Report and Recommendation of August 27, 1998, and dismissed all of plaintiff Edgardo Millet Sánchez's claims against co-defendant Administración de Compensaciones por Accidentes de Automóviles ("ACAA"), except for the claim pursuant to Title II of the ADA. (See Dockets No. 20 and 22).¹

Thereafter co-defendant ACAA filed several motions to dismiss: (1) Motion to Dismiss for Lack of Subject Matter Jurisdiction on October 6, 1999 (Docket No 36); (2) Motion to Dismiss the complaint, to Rule against Jury Trial and to Dismiss the Cross-Claim (Docket No. 37); Motion to Dismiss with prejudice and impose on Plaintiff Attorney's Fees (Docket No. 46); and Motion to Dismiss and /or for Summary Judgment on December 12, 2000. (Docket No. 93).

On March 14, 2000, plaintiff Millet filed a Motion for Leave to file and Amended Complaint (Docket No. 56), which was renewed on September, 8, 2000 (Docket No. 81). The amended complaint was filed on May 25, 2001 (Docket No. 127), after Judge García Gregory granted plaintiff's motion to file the amended complaint. (See Docket No. 126).

All dispositive pending motions in this case were referred for report and recommendation on June 29, 2001.² (Docket No. 133).

¹ A detailed description of the factual background of the case can be found in Magistrate Delgado's Report and Recommendation. (Docket No. 20).

² There are several Motions for Summary Judgment pending (Docket Nos. 67 and 94)

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3 MOTIONS TO DISMISS

4 As previously discussed, co-defendant ACAA has filed multiple motions to dismiss. The
 5 motions will be considered by the Court as Fed. R. Civ. P. 12(c) Motions for Judgment on the
 6 Pleadings, given that co-defendant ACAA filed an answer to the complaint on May 17, 1999
 7 (Docket No. 28).³ Defendant ACAA's Motion to Dismiss and/or for Summary Judgment (Docket
 8 No. 93), will be considered as a Motion to Dismiss because: (1) defendant ACAA has failed to
 9 comply with Local Rule 311.12⁴ pertaining to summary judgment motions; and, (2) even though
 10 theoretically the Court could look at matters outside the pleadings to determine the jurisdictional
 11 prerequisites of a case, the only exhibit submitted by ACAA with its motion, is an excerpt of
 12 plaintiff's deposition which sheds no light on the jurisdictional issues of the case.⁵

13 "Federal Rule of Civil Procedure 12(c) allows a party, '[a]fter the pleadings are closed but
 14 within such time as not to delay the trial, [to] move for judgment on the pleadings.' In reviewing
 15 such a motion, the district court must accept all of the nonmoving party's well-pleaded factual
 16 _____
 17 which have also been referred to the undersigned Magistrate Judge. For purposes of clarity, those
 18 issues will be discussed in a separate report and recommendation.

19 ³ Technically, the Court could also consider co-defendant's Motions under Fed. R. Civ.
 20 P. 12(h)(3), given that the main allegation in the Motion is that the Court lacks subject matter
 21 jurisdiction.

22 ⁴ Local Rule 311.12 serves as the anti-ferret rule in this District. See, e.g., Corrada
 23 Betances v. Sea-Land Service, Inc., 248 F.3d 40, 43-44 (1st Cir. 2001); Morales v. Orsleff's EFTE,
 24 246 F.3d 32, 33-35 (1st Cir. 2001); Ruiz Rivera v. Riley, 209 F.3d 24, 27-28 (1st Cir. 2000); Ruiz
v. Caribbean Restaurants, Inc., 54 F.Supp.2d 97, 102 (D.P.R. 1999); Dominguez v. Eli Lilly & Co.,
 958 F.Supp. 721, 727 (D.P.R. 1997).

25 ⁵ The exhibit contained in co-defendant's Motion to Dismiss (Docket No. 93), has been
 26 submitted in an effort to establish that plaintiff Millet has failed to state a claim for which relief can
 27 be granted, given that there is some evidence which puts into question his status as a "qualified
 28 individual" under the ADA. Co-defendant ACAA already had an opportunity to bring a 12(b)(6)
 motion, which was granted for the most part by Magistrate-Judge Delgado in her Report and
 Recommendation of August 27, 1998. Inasmuch as there might still be an issue of whether or not
 plaintiff Millet is a "qualified individual" under the ADA is an inquiry better suited for summary
 judgment.

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2 averments as true and draw all reasonable inferences in [his] favor.” Feliciano v. State of Rhode
 3 Island, 160 F.3d 780, 788 (1st Cir. 1998)(citing Rivera-Gomez v. Adolfo de Castro, 843 F.2d 631,
 4 635 (1st Cir. 1998)). Under Rule 12(c) judgment on the pleadings is not appropriate unless it appears
 5 beyond a doubt that the nonmoving party can prove no set of facts in support of his claim which
 6 would entitle him to relief. See Feliciano v. State of Rhode Island, 160 F.3d at 788 (citing Santiago
 7 de Castro v. Morales Medina, 943 F.2d 129, 130 (1st Cir. 1991)).

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9 **TITLE II OF THE ADA**

10 “Congress enacted the ADA ‘to provide a clear and comprehensive national mandate for the
 11 elimination of discrimination against individuals with disabilities.’ 42 U.S.C. § 12101 (b)(1). . . .
 12 Title II, the provision at issue [in this case], prohibits discrimination against persons with disabilities
 13 by ‘public entities,’ and is modeled on § 504 of the Rehabilitation Act, Pub.L. No. 93-112, 87 Stat.
 14 355 (1973) (codified as amended in scattered sections of 29 U.S.C.). . . . In applying Title II,
 15 therefore, [the Court] rel[ies] interchangeably on decisional law applying § 504.” Parker v.
 16 Universidad de Puerto Rico, 225 F.3d 1, 4 (1st Cir. 2000)(citing Therault v. Flynn, 162 F.3d 46, 48
 17 n. 3 (1st Cir. 1998); Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998)). Even though “the
 18 language of Title II does not elaborate on the obligation [that] a public entity [has towards] an
 19 individual with a disability” when rendering its services and programs, a look at the regulations
 20 promulgated under Title II sheds some light as to some of the plausible duties that ACAA might
 21 have under the statute. See, e.g., Parker v. Universidad de Puerto Rico, 225 F.3d at 5-6.

22 “To prove [that] a public program or service violate[d] Title II of the ADA, a plaintiff must
 23 show: (1) he is a ‘qualified individual with a disability;’ (2) he was either excluded from
 24 participation in or denied the benefits of a public entity’s services, programs or activities, or was
 25 otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or
 26 discrimination was by reason of his disability.” Weinreich v. Los Angeles County Metro. Transp.
 27 Auth., 114 F.3d 976, 978 (9th Cir.), cert. denied, 522 U.S. 971 (1997).

28 Defendant ACAA, in the multiple motions to dismiss, makes several arguments in support
 of the contention that plaintiff Millet’s title II claims under the ADA warrant dismissal. The

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2 arguments are: (1) that plaintiff Millet's ADA claim against ACAA is barred by virtue of Eleventh
3 Amendment immunity; (2) that plaintiff Millet failed to make an allegation of intentional
4 discrimination and that said allegation is necessary for the availability of compensatory damages;
5 (3) that plaintiff Millet is not entitled to a jury trial; and, (4) that the ADA provides a 'safe harbor'
6 for insurance activities.

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I. Eleventh Amendment Immunity

9 The Supreme Court has recently found that suits in federal court by state employees to
10 recover money damages by reason of the state's failure to comply with the ADA are barred by the
11 Eleventh Amendment. See Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356
12 (2001). See also Badillo-Santiago v. Andreu-Garcia, 167 F.Supp.2d 194 (D.P.R. 2001)(discussing
13 the issue of Eleventh Amendment immunity relative to title II of the ADA in a suit involving the
14 Commonwealth of Puerto Rico). Therefore, defendant ACAA makes the argument that Millet's
15 ADA claim is barred by the Eleventh Amendment. (See Docket No. 93).

16 Defendant ACAA, however, neglects to address the fact of whether or not the agency
17 (ACAA) is an alter ego or an arm of the state, and thus enjoy the privilege of immunity. ACAA, as
18 the movant, has failed to present evidence showing that it indeed deserves the immunity it seeks.
19 See, e.g., Rodriguez v. Nazario, 719 F.Supp 52, 57 (D.P.R. 1989). See also Aviles-Martinez v.
20 Monroig, 963 F.2d 2, 7-8 (1st Cir. 1992)(detailing the factors to be considered by the Court when
21 determining whether an entity is an alter ego of a state). Not only has defendant ACAA failed to
22 bring forth proof of its alleged status as an alter ego of the state, but also, this Court has found at
23 least one case in which ACAA has been found to be an independent entity not entitled to Eleventh
24 Amendment immunity. See Aviles Martinez v. Jimenez Monroig, 1992 WL 448492, *3-5 (D.P.R.
25 1992).

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2 **II. Allegation of intentional discrimination,**
 3 **availability of compensatory damages,**
 4 **and jury trial**

5 Defendant ACAA argues that Millet can not obtain compensatory damages under Title II of
 6 the ADA because he has not alleged 'intentional discrimination' on the part of ACAA. (See Dockets
 7 No. 37, 44 and 46). First, it is important to note, that the Court allowed plaintiff Millet' request
 8 for Leave to Amend the Complaint, and that the tendered amended complaint does include
 9 allegations of intentional discrimination. (See Dockets No. 126 and No. 127).

10 There exists case law in support of the proposition that plaintiff Millet may be entitled to
 11 compensatory damages as long as he can support an inference of discriminatory intent on the part
 12 of ACAA. See, e.g., Midgett v. Tri-County Metropolitan Transportation District of Oregon, 245
 13 F.3d 846, 851 (9th Cir. 2001); Dorsey v. City of Detroit, 157 F.Supp.2d 729, 731-32 (E.D.Michigan
 14 2001) (plaintiff entitled to trial by jury under title II of the ADA); Macy v. Saif Corp., 2000 WL
 15 277164, *6 (D.Or. 2000). Furthermore, both compensatory damages and the right to a jury trial are
 16 available under § 504 of the Rehabilitation Act.⁶ See James v. Peter Pan Transit Management, Inc.,
 17 1999 WL 735173 (E.D.N.C. 1999)(citing Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 832 (4th
 18 Cir. 1994)). See also, Moreno v. Consolidate Rail Corp., 99 F.3d 782, 789 (6th Cir. 1996); W.B.
 19 v Matula, 67 F.3d 484, 494 (3rd Cir. 1995); Rodgers v. Magnet Cove Public Schools, 34 F.3d 642,
 20 645 (8th Cir. 1994); Campos v. San Francisco State University, 1999 WL 1201809, *9 (N.D.Cal.
 21 1999); Leo v. City of Stamford, 919 F.Supp. 70, 73-75 (D. Conn. 1995).

22 Because the allegations made by Millet in his amended complaint must be taken as true for
 23 purposes of a motion to dismiss, the Court, at this juncture of the proceedings, finds that plaintiff
 24 Millet has pleaded sufficient facts to sustain a claim for compensatory damages and the right to a
 25 jury trial under Title II of the ADA.

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 28 ⁶ Given that Title II if the ADA was modeled on § 504 of the Rehabilitation Act, Courts often rely on decisional law relative to § 504 when deciding Title II cases. See, e.g., Parker v. Universidad de Puerto Rico, 225 F.3d at 4.

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2 **III. Safe Harbor for Insurance**

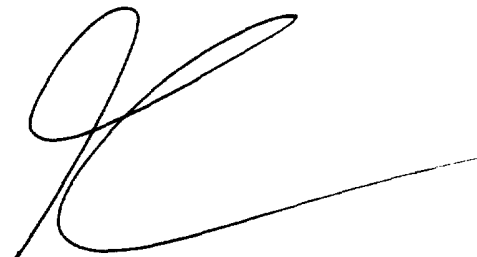
3 Defendant ACAA suggests that insurance activities, such as the ones provided by ACAA,
 4 are not covered by the ADA. (See Docket No. 93). True enough, Section 501(c) of Title V of the
 5 ADA, known as the “safe harbor” provision, exempts insurers from the regulatory scope of Titles
 6 I through III of the Act if they meet certain conditions. See 42 U.S.C. § 12201(c). The
 7 aforementioned section stands for the proposition that “the ADA shall not prevent insurers from
 8 ‘underwriting risks, classifying risks, or administering such risks that are based on or not
 9 inconsistent with State law,’ provided that this safe harbor ‘shall not be used as a subterfuge to evade
 10 the purposes of [Titles] I [through III] of [the Act].’” Leonard v. Israel Discount Bank of New York,
 11 199 F.3d 99, 103 (2nd Cir. 1999)(citing 42 U.S.C. § 12201(c)). However, Title V does not provide
 12 insurance companies with a blanket exclusion from the mandates of the ADA, but rather allows them
 13 to make the necessary classifications commonly done in the insurance business when underwriting
 14 risks without violating the ADA.

15
16 **CONCLUSION**

17 In view of the aforementioned, this Court **RECOMMENDS** that defendant ACAA’s
 18 Motions to Dismiss (Dockets Nos. 36, 37, 46 and 93) be **DENIED**.

19 Under the provisions of Rule 510.2, Local Rules, District of Puerto Rico, any party who
 20 objects to this report and recommendation must file a written objection thereto with the Clerk of the
 21 Court within ten (10) days of the party’s receipt of this report and recommendation . The written
 22 objection must specifically identify the portion of the recommendation, or report to which objection
 23 is made and he basis for such objections. Failure to comply with this rule precludes further appellate
 24 review. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Davet v. Maccorone, 973 F. 2d 22, 30-31
 25 (1st Cir. 1992).

26 At San Juan, Puerto Rico this 13th day of December, 2001.



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GUSTAVO A. GELPI
United States Magistrate-Judge